Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of GCB Communications, Inc.	)	WC Docket No.11-141
d/b/a Pacific Communications and Lake	)	
Country Communications, Inc. for	)	
Declaratory Ruling	)	

APPLICATION OF U.S. SOUTH FOR FULL COMMISSION REVIEW

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TABLE OF CONTENTS

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Pursuant to Section 5(c)(4) of the Communications Act of 1934, 47 U.S.C. § 155(c)(4), and Section 1.115(a) of the Commission's rules, 47 C.F.R. § 1.115(a), U.S. South Communications, Inc. ("U.S. South"), by its attorney, hereby requests review by the Commission of the *Declaratory Ruling* adopted and released June 29, 2012 by the Chief, Wireline Competition Bureau (the "Bureau").[1]

INTRODUCTION & SUMMARY

In this proceeding, the Bureau decided a question of law relating to payphone compensation, holding for the first time that a payphone service provider ("PSP") is entitled to per-call compensation whether or not an interexchange carrier ("IXC") has complied with its regulatory obligation to establish an "accurate" call-tracking system, and regardless of whether the express "prerequisite" to compensation — payphone-specific coding digit identifiers — have been "transmitted."[2] The Commission itself should review and reverse the *Declaratory Ruling* for three principal reasons.

[1] DA 12-1046.

[2] 47 U.S.C. § 276; 47 C.F.R. § 64.1300 *et seq. See* Section II below.

First, as a matter of both comity and Commission authority, decisions in "primary jurisdiction" cases referred from the federal courts[3] should be made by the agency and its members themselves, not a single (and, now, former) staff employee. Indeed, there is nothing in the Commission's Rules permitting disposition of primary jurisdiction petitions on delegated authority or for the establishment — as the Bureau Chief has improperly done in this matter — of new FCC law and policy at the staff level.

Second, the *Declaratory Ruling* meets all the settled criteria for review by the full Commission. Specifically, the Bureau's decision (i) is in direct conflict with the Commission's regulations, orders and policy regarding payphone compensation; (ii) involves a question of law that has not previously been resolved by the Commission; (iii) represents a misapplication of Commission precedent which should be overturned or revised, and (iv) is based on a flatly erroneous finding on an important and material question of fact. Obviously, had the Commission's compensation plan meant what the Bureau now says, there would have been no need in its 1998 *Coding Digit Waiver Order*[4] for the Common Carrier Bureau to have required IXCs to pay per-call compensation before the current Flex-ANI system was finally operational; according to the Bureau Chief, the Commission's rules, orders and policy have *always* entitled PSPs to compensation without regard to the transmission of payphone-specific coding digits. *Declaratory Ruling* ¶ 25. Hence, purporting merely to "clarify" prior Commission orders, the *Declara-*

[3] U.S. South was the prevailing party in the federal court litigation giving rise to this primary jurisdiction referral. *GCB Comms., Inc. v. U.S. South Comms., Inc.*, No. 07-cv-02054-SRB (D. Ariz. Oct. 30, 2009), *rev'd*, 650 F.3d 1257 (9th Cir. 2011), *rehearing denied*, Order, No. 09-17646 (9th Cir. May 23, 2011). U.S. South sought a primary jurisdiction referral to the Commission for interpretation of the payphone rules, but was opposed by Petitioners at trial and on appeal. *GCB*, 650 F.3d at 1264.

[4] *Declaratory Ruling* ¶¶ 22-23; *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd. 4998, 5006-07 (1998) ("*Coding Digit Waiver Order"*).

tory Ruling instead ***overrules*** the Commission's settled decisions by making payphone compensation a matter of strict liability for carriers and thus renders a nullity of Sections 64.1310 and 64.1320 of the rules.

Third, even if the Bureau were correct in its logic, the question of identifying payphone calls is a serious matter, affecting *all* local exchange carriers ("LECs") and IXCs (both "intermediate" and "completing" carriers),[5] thus having industry-wide consequences. The *Declaratory Ruling* fundamentally alters the balance of risks and costs the Commission so carefully set in its series of seminal orders implementing the Telecommunications Act of 1996. As demonstrated below, the Bureau Chief's principal rationale — namely that PSPs lack sufficient visibility to the public switched network to know for certain whether Flex-ANI codes are transmitted correctly by LECs — is not only wrong, it is an *equitable* consideration this Commission applied in the past for fashioning the procedures of its payphone compensation plan, but **never** as the basis for allocating substantive rights to and liability for compensation itself. The inevitable result of a strict liability rule is that PSPs will have no reason to negotiate consensual compensation arrangements while IXCs, conversely, will have a powerful incentive to block payphone-originated traffic, a small, rapidly diminishing segment of telecommunications in light of today's ubiquitous mobile wireless services.

Having ordered the LECs to implement a complex and expensive system of Flex-ANI as the foundation for the transition from a per-phone to a per-call compensation plan — a transition completed well more than a decade ago — and having included in its payphone orders *from the very start* a mandate that all payphone calls include specific "coding digit" identifiers, the Commission should not allow the Bureau to abandon that system by requiring carriers to pay com-

[5] 47 C.F.R. § 64.1300(a).

pensation completely without regard to its implementation and correct operation. Nor should the full Commission allow the Bureau, as the *Declaratory Ruling* clearly does, to overrule the FCC's prior policy that its decisions must be fair to all parties, not just PSPs, by balancing relative risks, costs and benefits. Principal among these was that, once payphone identifiers were available, carriers could rely on them as the basis of their call tracking system for per-call compensation. By abandoning the acknowledged "industry standard" for payphone call tracking, *Declaratory Ruling* ¶ 27, the Bureau has thus abandoned a basic Commission principle in this area and contradicted the Commission's long-settled policy of assuring fairness, practicality and administrative efficiency in per-call payphone compensation.

The Commission should instead reverse the *Declaratory Ruling* and respond to the federal courts by declaring that an IXC may rely on Flex-ANI to identify payphone calls as the basis for compliance with the longstanding mandate that carriers deploy an "accurate" payphone call-tracking system, and thus may lawfully refuse compensation for calls lacking payphone-specific coding digits.[6] It would make no legal or policy sense, as the Bureau irrationally concluded, for the huge undertaking of Flex-ANI implementation, an integral part of the Commission's shift more than a decade ago from a per-phone to per-call payphone compensation scheme, to be completely irrelevant to a carrier's obligations under the Commission rules implementing Section 276 of the Act.[7]

BACKGROUND

A proper understanding of the history and structure of the Commission's lengthy efforts to balance the rights and obligations of PSPs, LECs and IXCs with respect to identifying, track-

[6] 47 C.F.R. § 64.1310(a)(1).

[7] 47 U.S.C. § 276.

ing completion and remitting compensating for payphone calls is vital. The FCC recognized that because answer supervision is provided on call termination only to the last IXC handling a payphone call — known as a "Completing Carrier" — it was important to require IXCs to establish and deploy a system for tracking payphone calls to completion, as the Completing Carrier alone has direct access to completion data. At the same time, the Commission understood and expressly recognized that when Section 276 was enacted, Completing Carriers had no technical means to identify calls as originating from payphones because the "coding digits" associated with such calls were not unique to payphones. Accordingly, the Commission imposed two parallel requirements.

1. LECs were required to deploy a system of Flex-ANI that utilizes unique coding digit identifiers in a call's ANI to identify a call as having originated from a payphone.[8]

2. IXCs were required to establish a system that "accurately" tracks completed calls, to issue periodic reports to PSPs and to certify annually, via independent audit, the compliance of their call-tracking systems with the Commission's payphone rules.[9]

These dual requirements were fundamental to the Commission's efforts to implement Section 276. Recognizing that per-call compensation was not at first technically feasible, the Commission initially mandated a transitional system of per-phone compensation, under which each IXC paid to PSPs a fixed charge per phone based on a list of payphone ANIs issued quarterly by the LECs.[10] In order to supply the information to IXCs necessary to support a per-call

[8] *See* below at Section II(A) for a full discussion of the Commission's many reiterations of the requirement that LECs and PSPs "generate" and "transmit" payphone-specific coding digits with each call.

[9] *See, e.g.*, 47 C.F.R. § 64.1310(a)(1)(call tracking); 47 C.F.R. § 64. 1320(a)(audits)

[10] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Report and Order, 11 FCC Rcd. 20541, 20567, 20578 at ¶¶ 50, 72 (1996)(*"First Payphone Order"*).

compensation scheme, the Commission then ordered the LECs to deploy Flex-ANI to provide a means of differentiating payphone-originated calls, eligible for compensation if completed, from other calls encompassed in the prior system of ANI "information digits" (such as hotel, hospital and other "restricted" phones for which billing to the line was not permitted).[11] Together, these twin mandates allowed IXCs to identify payphone calls, and thus program their switches to record completion data for such calls, permitting payment of compensation to PSPs on a per-call basis. Compensation was and remains due at the FCC-prescribed "default" rate in the absence of a negotiated PSP/IXC agreement on per-call compensation charges. 47 C.F.R. § 64.1330(d).

It is in this context that the present primary jurisdiction referral comes before the Commission. The federal court litigation established that Petitioners and U.S. South had not agreed on a per-call compensation rate. It is also undisputed that U.S. South properly remitted compensation at the prescribed "default" per-call rate for *every* completed call that included associated Flex-ANI data identifying it as a payphone call.[12] GCB and Lake Country were unable to prove why the disputed calls lacked correct Flex-ANI identifiers and declined to introduce evidence from their serving LECs that Flex-ANI had been correctly transmitted. Nor did they claim, let alone prove, that U.S. South's call tracking system was in any way deficient or otherwise violated the requirement of Section 64.1310(a)(1) of the rules that each carrier utilize an "accurate" call tracking methodology.

It was only by means of a strained interpretation of the Commission's rules that the district court was able to enter judgment for Petitioners. "[T]he district court determined the result based on a legal conclusion: it interpreted the FCC regulations on dial-around compensation to

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[11] *First Payphone Order*, 11 FCC Rcd. at 20597-98 ¶ 113.

[12] "The parties agree that U.S. South has compensated GCB for all calls for which U.S. South received the payphone specific Flex-ANI coding digits." *GCB,* 650 F.3d at 1261 n.2.

require that once PSPs 'set up (or provision) their payphone lines with Flex-ANI capability' they are owed compensation for completed calls, even if the Flex-ANI coding is not sent to or received by the completing carrier." *GCB Comms., Inc. v. U.S. South Comms., Inc.,* 650 F.3d 1257 1262 (9th Cir. 2011). The Court of Appeals reversed, concluding that the Commission's 1996, 1998 and 2003 payphone orders — which all require that "LECs transmit payphone-specific coding digits to PSPs, and that PSPs transmit those digits from their payphones to IXCs" — mean that Flex-ANI codes must accompany each compensable payphone call "because the whole purpose of the Flex-ANI system was to implement a practical way for completing carriers to determine that a call was from a PSP. That, in the long run, facilitates the prompt payment of amounts owed to all PSPs." *Id.* at 1265-66.

The purpose of this primary jurisdiction referral is for the Commission to decide whether the Court of Appeals was correct. Petitioners and the *Declaratory Ruling* continue to insist that PSPs have no responsibility to transmit Flex-ANI coding digits, but the Ninth Circuit did not rule they did. Instead, the Court of Appeals expressly recognized "the fact that in the way the industry developed, the Flex-ANI codes are not directly transmitted by the payphones themselves — those phones are not set up to do so." 650 F.3d at 1267. The Court's opinion explains that ***as between PSPs and Completing Carriers,*** the risk for absent or incorrect Flex-ANI information falls on the PSP. *Id.* at 1266.

If the Ninth Circuit is right, as U.S. South respectfully suggests it was, that does not mean a PSP is to be denied compensation for completed calls for which specific payphone Flex-ANI was missing. Instead, it only means that a Completing Carrier which utilizes Flex-ANI as the basis for its call tracking system cannot be required to compensate PSPs for calls missing correct Flex-ANI information where, as here, there is no showing that it did anything wrong. When

something fails in the Flex-ANI system, one of the many entities involved in a payphone call (the PSP, the originating LEC, the intermediate carrier or the Completing Carrier) should be held accountable. But in the absence of evidence, as in this case, that the failure was the fault of the Completing Carrier, there is no basis in the Commission's rules to impose liability on that party under Section 201 for an "unreasonable practice."

ARGUMENT

The issue before this Commission is the same as that addressed by the Court of Appeals for the Ninth Circuit, namely "whether U.S. South was required to pay GCB for completed coin-less payphone calls — dial-around calls — if U.S. South did not receive coding digits that would identify the calls as GCB payphone calls." *GCB,* 650 F.3d at 1260. If a Completing Carrier may permissibly rely on Flex-ANI for its call-tracking — a question to which the answer is most assuredly yes, as the Bureau concedes — then there is no basis in the Commission's payphone compensation rules, its various orders or public policy under Section 276 to impose payment liability on carriers who, as in this case, have done everything required of them.[13]

Nothing in Section 276 or the implementing FCC rules can or should make carriers' pay-phone compensation obligations a matter of strict liability or reduce the costly and long process of converting LEC central offices to Flex-ANI compatibility to a matter of legal irrelevance.

[13] Revealingly, Petitioners' court complaint did not assert that U.S. South violated ***any*** regulation or order promulgated pursuant to Section 276 of the Act as part of the per-call payphone compensation plan. Hence, because the Supreme Court has held that only a violation of an FCC regulation permits a PSP to establish a cause of action under Sections 201(b) and 207 for damages, GCB and Lake Country cannot claim, and the Commission accordingly cannot on this record assume, that U.S. South is in any way not fully compliant with its call tracking, auditing and other obligations with respect to payphone compensation. *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.,* 423 F.3d 1056, 1064 (9th Cir. 2005) ("[a] failure to pay in accordance with the Commission's payphone rules . . . constitutes . . . an unjust and unreasonable practice in violation of § 201(b) of the Act"), *aff'd,* 550 U.S. 45 (2007).

Petitioners have a remedy under the Act against their serving LECs if Flex-ANI is not transmitted with payphone calls in accordance with the payphone rules, or against the IXCs if those carriers drop, corrupt or ignore Flex-ANI codes, but should not be permitted unilaterally to transfer responsibility for the correct operation of the Flex-ANI system to carriers like U.S. South.

I. THE BUREAU LACKED DELEGATED AUTHORIITY TO RULE ON THE PETITION AND, IN ANY EVENT, AS A MATTER OF COMITY THE FULL COMMISSION SHOULD ITSELF RESPOND TO PRIMARY JURISDICTION REFERRALS

The Act permits the Commission to delegate certain functions, but disposing of legal questions of first impression referred by federal courts under the primary jurisdiction doctrine is not one the FCC may, has or should delegate to the Wireline Competition Bureau.

The Bureau is authorized to "act on requests for interpretation or waiver of rules" and its Chief is delegated the power to perform any Bureau action except "applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines." 47 C.F.R. §§ 0.91(b), 0.291(a)(2). Deciding either primary jurisdiction referrals generally or, as here, conceded legal questions of first impression are not "[f]unctions of a continuing or recurring nature" delegated to the Bureau Chief by rule. *Id.* § 0.201 (d)(1). Consequently, it was incumbent on the Commission to delegate authority for this "particular matter or proceeding" by order. *Id.* § 0.201(d)(2). Because that was never done, disposition of this primary jurisdiction referral was beyond the scope of the Bureau Chief's delegated authority.

A simple example illustrates the point. The Commission just recently adopted an order and new rules for universal service reform. Since like here the rules are rather arcane and complex, the FCC specifically delegated authority to the Bureau to "make any further rule revisions as necessary to ensure that the reforms adopted in this Order are properly reflected in the rules.

This includes correcting any conflicts between the new or revised rules and existing rules as well as addressing any omissions or oversights."[14] This proceeding is precisely the same, because it involves a conflict between rules (64.1300(b) and 64.1310(a)(1)) *and* an "omission or oversight" — whether the Flex-ANI requirement adopted by the Commission is a sufficient basis for carriers' compliance with their duty to establish an accurate call tracking system. For the Bureau to supply an answer left unstated by the Commission in 1996-2003 is admittedly filling a hole in orders, rules and policies, not merely "interpreting" them. *Declaratory Ruling* ¶ 24 (the 1998 *Coding Digit Waiver Order* "simply did not address whether compensation was owed for completed calls when Flex ANI coding digits were not transmitted with each call"). Absent a delegation order for this proceeding, the *Declaratory Ruling* was outside the Bureau's delegated authority.

Beyond this, U.S. South submits that disposition of primary jurisdiction referrals by the staff on delegated authority, even if permissible without a proceeding-specific delegation, is unseemly, disrespectful to the courts, and something the Commission should preclude as a matter of practice. The purpose of primary jurisdiction, which despite its name does not involve jurisdiction at all, is for courts deciding civil cases involving a subsidiary question of law or fact within the specialized competence of an administrative agency to seek the views of the "expert agency" for consideration. *County of Santa Clara v. Astra United States,* 588 F.3d 1237, 1251 (9th Cir. 2009) ("[P]rimary jurisdiction is properly invoked when a claim is cognizable in federal court but requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency.") Its objective is to promote consistency in

[14] *Connect America Fund,* Report and Order and Further Notice of proposed Rulemaking, WC Docket No. 10-90, FCC 11-161, ¶ 1404 (rel. Nov. 18, 2011).

legal rulings between courts and the agencies even where, as in this case, the law provides no grounds for agency adjudication because Petitioners elected to bypass an administrative complaint in favor of litigation. *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002) (doctrine does not require courts "to 'secure expert advice' for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit") (citation omitted).

That settled policy of deference by the federal courts to the FCC should be reflected in corresponding deference by the Commission to the courts. If a federal district judge, as here, exercises her discretion to seek agency advice before deciding a case of first impression involving application of the Commission's rules, it is altogether fitting and appropriate that the full Commission itself respond to such inquiries. The relative rarity of these primary jurisdiction requests strongly counsels for the adoption of such a practice, as the infrequency of referrals indicates that, when made, they are important and warrant the attention of the Commission itself. After all, if a federal court wants the opinion of the FCC's staff, Bureau Chief or otherwise, the court or a litigant can simply and often do ask for a letter or amicus brief. A formal primary jurisdiction referral indicates the matter is more serious and should as a matter of institutional comity be treated with equal respect by issuance of a decision from the full Commission.

II. THE BUREAU'S DECISION SHOULD BE REVIEWED AND REVERSED BECAUSE IT CONFLICTS WITH THE COMMISSION'S RULES, ORDERS AND POLICIES FOR PAYPHONE COMPENSATION

The *Declaratory Ruling* is fundamentally flawed because it contradicts the Commission's rules, orders and policies on payphone compensation by disregarding, and rendering irrelevant, the function of Flex-ANI as an integral part of a Completing Carrier's "accurate" call-tracking system under the Commission's per-call payphone compensation rules.

As all parties explicitly recognized, there are a number of "carriers in the call path." *Petition* at 3; *Declaratory Ruling* ¶ 34. One of those, the Completing Carrier, has an obligation to deploy a call tracking system. Another of those, the serving (originating) LEC, has an obligation to insert payphone-specific Flex-ANI coding digits into the call set-up information transmitted along with coinless payphone calls. In cases, such as this one, where there has been an unexplained failure of Flex-ANI transmission, the entitlement of PSPs to per-call compensation cannot be answered by looking only to whether the PSP has ordered a payphone line from the serving LEC.

A. This Commission Has Repeatedly Reaffirmed That Flex-ANI, Where Available, Must Be "Transmitted" With Every Payphone Call

It is evident that Flex-ANI must accompany each payphone call because, as the Ninth Circuit reasoned, "the whole purpose of the Flex-ANI system was to implement a practical way for completing carriers to determine that a call was from a PSP." 650 F.3d at 1266. The payphone rules and orders wholly validate this conclusion. The Commission itself repeatedly reaffirmed that Flex-ANI, where available from a LEC central office, must be "transmitted" with every payphone call.

In 1998, the Common Carrier Bureau determined that the transmission and provision of payphone-specific Flex-ANI codes to carriers with all calls was "a prerequisite to payphone per-call compensation."[15] This represented (until the present *Declaratory Ruling*) a straightforward application of the Commission's payphone orders, which have consistently held that Flex-ANI must be "transmitted" and "generated" with every payphone call. For instance, the initial *First Payphone Order* concluded that "each payphone should be required to generate 07 or 27 coding

[15] *Coding Digit Waiver Order* ¶ 13.

digits within the ANI for the carrier to track calls."[16] *Declaratory Ruling* ¶ 5. In its 1996 *Reconsideration Order*, the Commission clarified that "[e]ach payphone must transmit coding digits that specifically identify it as a payphone, and not merely as a restricted line."[17] *Declaratory Ruling* ¶ *6.* The later 1998 Bureau *Coding Digit Waiver Order* reiterated that "for payphones to be eligible for compensation, payphones will be required to transmit specific payphone coding digits,"[18] and that "[t]his limited waiver applies to the requirement that LECs provide payphone-specific coding digits to PSPs, and that PSPs provide coding digits from their payphones before they can receive per-call compensation from IXCs for subscriber 800 and access code calls."[19] *Declaratory Ruling* ¶¶ 7-9.

More generally, the Commission's compensation plan utilized an initial transition period of per-phone compensation, in which carriers were directed to remit a specified amount to each ANI identified as a payphone by the serving LEC. This was replaced one short year later (subject to extensions via waiver) with a per-call system under which the transmission of payphone-specific coding digits is explicitly a "prerequisite" to compensation. Denying carriers the right to rely on Flex-ANI is thus the equivalent of requiring that they pay off of payphone ANI lists, the very system the Commission resolved as a matter of administrative policy should be in place only temporarily.

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[16] *First Payphone Order*, 11 FCC Rcd. at 20591 ¶ 98.

[17] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd. 20541, 20591 at ¶ 64 (1996).

[18] *Coding Digit Waiver Order*, 13 FCC Rcd. at 5006 ¶ 13 (citation omitted).

[19] *Id.* at 5007 ¶ 14.

There is no question that Flex-ANI is not in fact generated today by payphones, and that neither the district court nor the Ninth Circuit have imposed any such requirement. Perhaps the Commission or the Common Carrier Bureau misunderstood the expected capabilities of "smart" payphones when the compensation plan was developed some 15 years ago. But it is self-evident that the Commission explicitly linked Flex-ANI availability from "each payphone" with a carrier's ability to identify payphone-originated calls for compensation purposes. As the Bureau explained contemporaneously, "*before they can receive per-call compensation* from IXCs for subscriber 800 and access code calls," payphone calls must include "payphone-specific coding digits." *Coding Digit Waiver Order,* 13 FCC Rcd. at 5007 ¶ 14 (emphasis supplied).[20] The Ninth Circuit thus properly reasoned that whether Flex-ANI is transmitted by the PSP or its serving LEC is immaterial to the fact that the Commission has required that all payphone calls include correct Flex-ANI to be eligible for payphone compensation:

> As we see it, that makes no real difference: whether an LEC transmits the Flex-ANI digits to the payphone, which then transmits them — necessarily back through the LEC — into the system, or whether that circular route is avoided and the LEC adds the Flex-ANI digits when the call comes to it from the payphone, the result is necessarily the same. By the time the call leaves the LEC and enters the system, the Flex-ANI digits will be attached — or should be.

GCB, 650 F.3d at 1265. That is a correct application of the Commission's mandate that payphone-specific coding digits accompany payphone calls as a condition of compensation. The Bureau Chief's contrary conclusion should be vacated.

[20] For PSPs to be eligible for compensation, "payphones will be required to transmit specific payphone coding digits." *Coding Digit Waiver Order,* 13 FCC Rcd. at 5006-07 ¶ 13.

B. Carriers Were Given the Ability To Utilize Flex-ANI As a Means of Per-Call Tracking And Compensation And Therefore Must Be Able To Rely Upon the Presence Or Absence of Payphone "Coding Digits" For Compensation Purposes

It is beyond question that the Commission permits IXCs to utilize Flex-ANI as the basis for their payphone call tracking systems. Indeed, since the Commission itself has emphasized that an "accurate" system under Section 64.1310(a)(1) does not need to be perfect,[21] there is no basis to assert that failure to accurately track "each and every" payphone call to completion is somehow *per se* unreasonable under Section 276. While a Completing Carrier is not required to rely on Flex-ANI, that system was mandated in order to provide the precise per-call information necessary for IXCs to reliably track payphone calls and, as the Ninth Circuit found (and the *Declaratory Ruling* confirms), is the standard method for identifying payphone traffic. *GCB,* 650 F.3d at 1261; *Declaratory Ruling* ¶ 27.

Carriers were given the ability to utilize Flex-ANI as a means of per-call tracking and compensation and, therefore, must be able to rely upon such "coding digits" in discharging their compensation obligations. AT&T summarized the reasons for this rather cogently:

> The Flex ANI requirement is intended to ensure that the obligation to pay per-call compensation does not create an unfair burden on IXCs. As noted above, it does this by ensuring that IXCs can accurately track and bill their customers for payphone-originated calls, and it ensures that IXCs can block payphone-originated calls for those customers who do not wish to incur the surcharges associated with such calls. If Flex ANI is not transmitted, then any IXC that relies on Flex ANI – as IXCs are unquestionably permitted to do – is unable to track and bill for payphone-originated calls and cannot block the calls – the very purposes for which Flex ANI was required. Accordingly, under the Commission's rules the IXC has no obligation to pay per-call compensation for such calls, and it does not act unjustly or unreasonably by declining to pay such compensation.

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[21] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19994 ¶ 39 n.109 (2003).

> That conclusion is strongly supported by the history of the Commission's decisions related to the waivers extending the time for initial implementation of Flex ANI. When it granted the waiver extending the time for Flex ANI implementation, the [Bureau] made it clear that the waiver did not relieve IXCs of their obligation to pay compensation. But it also made it clear that, when payphone-specific coding digits were not available, an IXC would be permitted to compensate a payphone on a per-phone basis. ***In other words, the [Bureau] recognized that an IXC could not be required to pay per-call compensation when the very mechanism that the Commission had mandated for tracking, billing, and blocking payphone originated calls was not available.***

Reply Comments of AT&T at 2-3 (Oct. 17, 2011) (emphasis supplied). The *Declaratory Ruling* never provides a sensible explanation for why the Commission would, from its very first payphone compensation order, mandate the transmission of payphone-specific coding digits if that information were not integral to its per-call compensation plan.

At bottom, the *Declaratory Ruling* recognizes that the Commission imposed a mandatory call-identifying technology on the telecommunications industry, yet simultaneously concludes that use and reliance on that technology is legally irrelevant under the Commission's payphone compensation rules. This interpretation cannot be adopted without an unjustified departure by this agency from the terms repeatedly employed in its orders and the specific call-tracking obligation imposed on IXCs under Section 64.1310(a)(1) of its rules. If the FCC wants to revise its rules or their interpretation on a going-forward basis to provide "guidance on the respective obligations of PSPs. LECs and Completing Carriers," *Declaratory Ruling* ¶ 18, it has the power to do so. Conversely, however, the Commission cannot sustain a result that would impose compensation liability on IXCs retroactively by application of a "clarified" rule that contradicts all of its prior pronouncements on the subject.[22]

[22] *See* American PrePaid Phonecall Association *ex parte*, WC Docket No.11-141, Exh. 1, Slide 5 (April 25, 2012) ("*APPA Ex Parte*") ("GCB is wrong on the law. AT&T and Sprint are correct that, under current law, transmission of Flex/ANI digits triggers [the] per-call

There is an additional and important reason why the Bureau Chief's decision is seriously flawed, and must be vacated. The *Declaratory Ruling* insists that the 1998 *Coding Digit Waiver Order* supports its conclusion because IXCs were required to remit payphone compensation for a period, now almost 15 years ago, when Flex ANI was temporarily unavailable. *Declaratory Ruling* ¶ 24. What that indicates, however, is the opposite of the Bureau Chief's decision. Had the Commission's compensation plan meant what the Bureau now says, there would have been no need in granting an implementation deadline waiver to the LECs for the Bureau to have required IXCs to remit per-call compensation before the Flex-ANI system was finally operational; according to the Bureau Chief, the Commission's rules, orders and policy have *always* entitled PSPs to compensation for all completed calls without regard to the transmission and receipt of payphone-specific coding digits. *Declaratory Ruling* ¶ 25 ("the Commission always intended that PSPs would be compensated whether or not Flex ANI or ANI ii coding digits were attached to a call"). Hence, while purporting merely to "clarify" prior Commission orders, the *Declaratory Ruling* instead overrules the Commission's settled decisions by making payphone compensation a matter of strict liability for carriers and thus improperly renders a nullity of Sections 64.1310 and 64.1320 of the rules.

C. The Bureau's Decision Was Based On a Flatly Erroneous Finding On An Important And Material Question of Fact

The Bureau Chief was plainly wrong in finding that PSPs have no ability to monitor or confirm that Flex-ANI is being transmitted by LECs with their payphone calls. *Declaratory Ruling* ¶¶ 26, 34. There are procedures for determining whether LEC payphone lines are operating correctly, test numbers available from IXCs and other non-technical means — such as an unex-

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compensation obligation. The April 1998 Waiver Order makes this clear. Any contrary conclusion could be prospective only.").

pected drop in completion rate (and thus compensation) from a Completing Carrier — for PSPs to utilize as signals to identify and correct a system deficiency.

In fact, PSPs know whether Flex-ANI is broken because if it fails, their payments from carriers will stop or drop precipitously. As GCB itself asserted at trial in this case, a low completion rate from a Completing Carrier — one of the specific data sets for reporting which PSP aggregators routinely calculate and provide to their payphone operator clients — is a "red flag" for a problem with an IXC. AT&T again explained this with precision:

> [T]he IXC has no way to distinguish between a Flex ANI failure and any number of other reasons that payphone-specific coding digits are not transmitted with a particular call. Accordingly, there would be nothing to alert a Completing Carrier to any problem with Flex ANI. By contrast, PSPs have ample means to test Flex ANI and can do so on a routine basis. And a PSP (unlike a Completing Carrier) knows whether a particular payphone is connected to a payphone line, whether it is in service, and whether it is being used for dial-around calls and how many such calls are attempted. It can therefore detect (albeit after some weeks delay) whether its compensation payments are out of whack. If the Completing Carrier were under an obligation to pay per-call compensation notwithstanding the absence of Flex ANI, the PSP would lack the appropriate incentive to monitor and address any Flex ANI issues.

AT&T Reply Comments at 3-4.

The *Declaratory Order* relies on the opposite assumption, namely that the IXC "has the business relationship" with other carriers to correct Flex ANI transmission failures. *Declaratory Ruling* ¶ 35. That is simply wrong in the case of Completing Carriers, which have no business relationship at all to PSPs' serving LECs, as switch-based resellers ("SBRs") do not interconnect with or purchase originating access from LECs. To the contrary, therefore, "the PSP (unlike the Completing Carrier) has a customer-service provider relationship with the LEC that gives the PSP leverage to ensure that the service is provided as promised and that, otherwise, the PSP receives appropriate recompense." AT&T Reply Comments at 5. The Bureau Chief's order should therefore be set aside because it relies on a key and plainly incorrect factual determination.

II. REQUIRING PAYPHONE COMPENSATION "IRRESPECTIVE" OF THE TRANSMISSION OF FLEX-ANI CODING DIGITS WOULD MAKE FLEX-ANI IRRELEVANT, STRANDING THAT INVESTMENT AND NULLIFYING THE COMMISSION'S PER-CALL COMPENSATION PLAN

The gist of the *Petition*, adopted in full by the Bureau, was that because the Commission has addressed "the equity of placing the responsibility for tracking and paying coinless calls on the Completing Carrier," per-call compensation to PSPs must be owed "irrespective of whether payphone-specific coding digits are received for a particular call." *Petition* at 6; *Declaratory Ruling* ¶ 26 (denying compensation when calls are "not accompanied by Flex ANI … could lead to an inequitable situation…."). That the IXC is the "primary economic beneficiary" of dial-around calls, *Declaratory Ruling* ¶ 33, however, has no bearing on the appropriate role of Flex-ANI. As the Commission stated contemporaneously in 2003, rejecting out-of-hand the payphone industry's argument that compensation responsibilities should fall entirely on facilities-based IXCs (like here in order to avoid regulatory obligations for its members, artificially reduce PSP collection costs, and shift costs to payors), the agency has a duty to be fair to all sides.[23]

The *Declaratory Ruling* repeats the fallacy that the Act requires Completing Carriers to provide per-call compensation to the PSP for each completed call. That is manifestly untrue. Section 276 imposes no obligations on IXCs, which are entirely a creature of this Commission's payphone compensation rules and orders. Nor does the Commission's proper recognition of the "equity" of requiring IXCs to track completed calls at all lead to the conclusion that payphone-specific codes are irrelevant to compensation. Payphone traffic is a complex system, involving

[23] As the Commission emphasized then, "Section 276 requires us to ensure that per-call compensation is fair, which implies fairness to both sides." *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Fifth Order on Reconsideration, 17 FCC Rcd. 21274, 21302-03 ¶ 82 (2002). "Section 276 does not permit the Commission to lawfully 'require one company to bear another one's expenses.'" *Id.* (citing *Illinois Public Telecomms. Assn. v. FCC*, 117 F.3d 555, 556 (D.C. Cir. 1997).

several different entities and carriers, all of which must operate properly for payphone calls to be identified, tracked, completed and compensated. To isolate the obligations of a PSP alone, without reference to the corresponding mandates on LECs and IXCs, is to allow equity to override the law as expressed in this Commission's regulations.

The result of such an unprecedented interpretation of the Commission's rules is to read the Flex-ANI requirement out of the payphone plan entirely. As Sprint Nextel emphasized, "GCB has asked the FCC to interpret its rules so as to eliminate a system that took years and significant resources to establish and that provides the completing carriers an efficacious way to ensure that the call is from a payphone."[24] Under the *Declaratory Ruling's* approach, if the serving LEC fails to configure Flex-ANI correctly, if the LEC's switch software malfunctions, or if the Flex-ANI system fails for any reason to recognize a PSP line as a payphone line (and thus, as here, transmits incorrect, non-payphone Flex-ANI coding digits), responsibility in each of these circumstances would nonetheless lie totally with the Completing Carrier. The Bureau Chief does not discuss the "equity" of that untoward result because there is none.

Petitioners and the *Declaratory Ruling* also rely heavily on the purported fact that "the PSP has neither any visibility into nor any control over the network[s] over which a call is carried." *Petition* at 6; *Declaratory Ruling* ¶¶ 26, 34. That is not relevant. This Commission labored mightily to craft a payphone scheme which allocated responsibility among all parties and carriers involved in payphone-originated traffic. The FCC has utilized relative lack of information as the basis for requiring disclosures and reports from LECs and IXCs (including ANI lists, intermediate carrier reports and tracking system audit certifications, *see Declaratory Ruling* ¶¶ 31-32), but it has never allocated compensation liability or legal responsibility solely on the basis of such

[24] Reply Comments of Sprint Nextel Corp. at 1 (Oct, 17, 2011).

equitable considerations. More importantly, whatever equities today exist among LECs, IXCs. SBRs and PSPs are of no relevance to the Commission's legal interpretation of its decisions from more than a decade ago. And if relative equities are to be considered, the Commission is obligated to consider as well "the importance for prepaid providers of receiving real-time information when calls will be subject to per-call payphone compensation, because prepaid calling products are debited in real time, and prepaid providers have no opportunity to recover payphone compensation charges in arrears."[25]

This is not to say that if a Completing Carrier's system is faulty and fails to recognize or record Flex-ANI, in other words is not "accurate" for purposes of Section 64.1310(a)(1), an IXC can lawfully refuse to remit per-call compensation. In such a circumstance, pointedly **not** presented in this case or by the ***Petition***, the Completing Carrier would have violated the Commission's payphone rules and should presumptively be liable. The *Declaratory Ruling* nonetheless goes much further by holding that the PSP has no responsibility to prove that the IXC was in any way responsible or at fault for the Flex-ANI failure.

Such a result is both inequitable and unlawful because, as noted, a Completing Carrier's compensation obligation arises only under the Commission's payphone compensation rules, not Section 276 itself. In the absence of a violation by the IXC, the FCC has no basis in law to find that an IXC's practices are unjust or unreasonable under the Act. "[A]n IXC is entitled to rely on the proper transmission of Flex ANI digits to track and pay compensation; an IXC does not violate § 201(b) of the Act if it pays per-call compensation on all payphone-originated calls identified by proper Flex ANI digits." AT&T Reply Comments at 1.

[25] APPA *Ex Parte* at 2-3.

The *Declaratory Ruling's* dismissal of that conclusion has absurd consequences. The most significant is that the process of mandating that LECs reconfigure their central offices ("COs") to support Flex-ANI would be a nullity. That massive effort was not simple, quick or without cost; indeed, the Bureau was forced to waive it temporarily because the LECs found that converting to Flex-ANI was far more time-consuming and difficult than anticipated. Nonetheless, under the Bureau's current approach that capital investment in switch upgrades would be stranded because IXCs would receive no benefit from Flex-ANI and, as a business matter, would have no reason to order it from the LECs.

To be clear, payphone compensation disputes do not arise in a vacuum. Here, for instance, GCB and Lake Country had known for a long time that their call completion rate to U.S. South was lower than other IXCs, but refused to notify U.S. South, to test their lines with Petitioners' serving LECs, to challenge the annual call-tracking audit certifications filed by U.S. South or to file a compensation complaint with the Commission. They chose instead, after remaining silent for years, to proceed directly to federal court without any proof that U.S. South's system was at all deficient and, remarkably, never asserted that U.S. South had violated *any* Commission regulation. The *Declaratory Ruling* is incorrect in claiming PSPs are powerless to do anything about a defect or failure of Flex-ANI, and plainly wrong in suggesting that PSPs have no "visibility" to whether Flex-ANI is operating correctly. The answer to the PSPs' *relative* lack of information, however, is not to rewrite the Commission's payphone compensation plan to make Flex-ANI irrelevant.

III. PSPs HAVE A LEGAL CLAIM AGAINST THEIR SERVING LECs IF THE LECs FAIL TO TRANSMIT CORRECT PAYPHONE FLEX-ANI, SO LEAVING PSPs WITHOUT COMPENSATION IS NOT AT ISSUE HERE

The Petition and the Bureau leap from the assertion that a PSP has "discharged its responsibility in demonstrating [that it] has ordered ('provisioned') a payphone line from its serving LEC," to the conclusion that "even if a Completing Carrier could demonstrate that it took steps to ensure Flex-ANI was functioning properly," compensation is nonetheless owed even for calls lacking payphone-specific coding digits. *Petition* at 37. The rationale advanced is that PSPs would "otherwise be unable" to receive compensation to cover their costs for dial-around payphone traffic. *Id.* That is incorrect.

Indeed, the argument has no bearing on the issue referred to this Commission. The courts did not find, and neither the Petition nor the *Declaratory Ruling* contends, that U.S. South violated any FCC rule or order. Nor do GCB and Lake Country even suggest that the Commission's current audit, reporting or complaint procedures are an insufficient or inefficient means to recover unpaid compensation. There is no linkage between the strict liability rule announced by the Bureau's *Declaratory Ruling* and the ability of PSPs to recover payphone compensation for dial-around calls and thus cover their costs.

More significantly, the *Declaratory Ruling* wrongly assumes that all Flex-ANI failures are the responsibility of the Completing Carrier or its wholesale network provider (the Intermediate Carrier). *Declaratory Ruling* ¶ 24. There are of course entities other than IXCs involved in the payphone call path that can be at fault for Flex-ANI failures. Where a serving LEC defaults on its obligation to transmit payphone-specific Flex-ANI, that LEC has violated this Commission's rules and orders, and is thus liable under Section 201(b) of the Act. Accordingly, PSPs have a remedy against their LECs if Flex-ANI is not transmitted, provided incorrectly or fails for

any reason to be included with their calls to IXCs that have ordered and permissibly rely on those payphone identifiers.

Finally, the Commission should realize what the *Declaratory Ruling* does to its settled policy preference for negotiated compensation agreements and a market-based solution to payphone regulation. Where PSPs have no responsibility and are allowed to present compensation claims for the "default" rate of almost $0.50 per call — without even exploring whether a Flex ANI problem was the result of its serving LEC or an IXC — they will and have refused even to discuss an alternative compensation arrangement ("ACA") with Completing Carriers. Indeed, the result here further diminishes PSP incentives to employ the Commission's procedures for challenging call completion audits and utilizing interim carrier reports in order to resolve compensation discrepancies without litigation.

The *Declaratory Ruling* therefore does not achieve an "equitable" result so much as it further stacks the deck in favor of PSPs and allows them, as here, to use payphone compensation litigation as a form of legalized greenmail, because the costs of defense (and attorneys' fees) are an order of magnitude greater than most compensation amounts owed. The inevitable result of a strict liability rule is that PSPs will have absolutely no incentive to negotiate consensual compensation arrangements while IXCs, conversely, will have a powerful incentive to block all payphone traffic, a small and rapidly diminishing segment of telecommunications in light of today's ubiquitous mobile wireless services.[26]

CONCLUSION

The Commission should review and vacate the *Declaratory Ruling* and respond to the federal courts' primary jurisdiction referral by (a) reiterating that payphone-specific Flex-ANI

[26] APPA *Ex Parte* at 3.

must accompany each payphone-originated call as a condition precedent to compensation to PSPs, and (b) declaring that a Completing Carrier may permissibly rely on Flex-ANI to identify payphone calls consistent with the longstanding mandate that carriers deploy an "accurate" payphone call-tracking system under Section 64.1310(a)(1) of its per-call payphone compensation plan.

Respectfully submitted,

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